RONALD QUAY SDN. BHD.

v.

MAHESWARY SDN. BHD.

HIGH COURT, MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. C 1380 OF 1984]
13 MAY 1986

CIVIL PROCEDURE: *Appeal by plaintiff against decision of Senior Assistant Registrar ordering a stay of execution on the final judgment entered against defendant pending the hearing and disposal of defendant's counterclaim - Defendant claimed a larger amount than the plaintiff's claim as damages - Whether counterclaim bona fide and plausible - Whether stay of execution should be allowed.*

This was an appeal by the plaintiff against the decision of the Senior Assistant Registrar ordering a stay of execution on the final judgment entered against the defendant pending the hearing and disposal of the defendant's counterclaim.

The plaintiff's claim was for a sum of RM116,635.71 being the amount due and owing from the defendant to the plaintiff in respect of services rendered by the plaintiff to the defendant. The defendant made a counterclaim alleging that the plaintiff, in breach of its contractual obligations, cancelled the advertisement without the consent of the defendant and as a result the defendant suffered loss of sales and accruable profits. The defendant counterclaimed RM250,000 as damages.

Held:

[1] ollowing *Societe des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267, where "the defendant sets up a plausible counterclaim for an amount not less than the plaintiff's claim, the order...should be for judgment for the plaintiff on the claim with a stay of execution until the trial of the counterclaim".

[2] In its statement of defence, the defendant averred that at the trail of the suit the defendant would adduce evidence of the fact that the plaintiff, in breach of its contractual obligations cancelled the advertisement, which was for the benefit of the defendant, without the defendant's consent. As a result, the defendant suffered loss of sales and accruable profits. The loss incurred was expected to exceed the plaintiff's claim. The defendant further contended that the counterclaim was connected with the subject matter of the claim. In the circumstances, the Court found that the defendant's counterclaim was not made in bad faith.

[3] The defendant has set out a plausible counterclaim in that it is reasonably plausible for it to succeed at the trial. Therefore, the counterclaim is not frivolous.

[Appeal dismissed with costs.]

Cases also referred to:
Societe des Etains de Bayas Tudjuh v. Woh Heng Mining Kongri [1978] 2 MLJ 267
Lee Guat Eng v. Seet Tiam Hock [1974] 1 MLJ 178
Sheppards & Co. v. Wilkinson & Jarvis [1889] 6 TLR 13 CA

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 1

For the plaintiff - C. Sri kumar; M/s. Sri Ram, Zulkifly & Kumar
For the defendant - Y. Sivaloganathan; M/s. Siva, Thurai, Mariany & Co.

JUDGMENT

Zakaria Yatim J:

This is an appeal by the plaintiff against the decision of the Senior Assistant Registrar delivered on 11 October 1984 ordering a stay of execution on the final judgment entered against the defendant pending the hearing and disposal of the defendant's counterclaim.

The plaintiff's claim was for a sum of RM116,635.71 being the amount due and owing from the defendant to the plaintiff in respect of services rendered by the plaintiff to the defendant at the request of the defendant. The defendant in its statement of defence admitted that the plaintiff rendered the services but denied that it was indebted to the plaintiff in the sum claimed. The defendant also made a counterclaim alleging that the plaintiff, in breach of its contractual obligations, cancelled the advertisement without the consent of the defendant and the defendant suffered loss of sales and accruable profits. Accordingly, the defendant claimed RM250,000 as damages in the counterclaim.

The plaintiff applied for summary judgment under O. 14, r. 1 of the Rules of the High Court 1980 for the sum of RM116,635.71. On 11 October 1984, the Senior Assistant Registrar, entered judgment in the said sum but allowed stay of execution pending the trial of the counterclaim.

The appeal was heard before me in Chambers on 11 December 1984 and after hearing the arguments of both Counsel for the plaintiff and the defendant, I dismissed the appeal with costs. Mr. C.S. Kumar, Counsel for the plaintiff applied for the matter to be adjourned into Open Court for further argument. I allowed the application and further argument was heard by me in Open Court.

It was not disputed by the parties that in the present case stay of execution pending the trial of the defendant's counterclaim should be allowed provided that the counterclaim set out by the defendant was *bona fide* and plausible. The authorities are clear on this point. In *Societe des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267, Abdoolcader J, as he then was, held that where there was clearly no defence to the plaintiff's claim, so that the plaintiff should not be put to trouble and expense of proving it, but the defendant sets up a plausible counterclaim for an amount not less than the plaintiff's claim, the order should not be for leave to defend but should be for judgment on the claim with a stay of execution until the trial of the counterclaim. In his judgment at p. 269, the learned Judge said,

> If a defendant, though he admits part of the plaintiff's claim, sets up a defence to the residue and a counterclaim for a larger amount than the part of the plaintiff's claim admitted, he is entitled to unconditional leave to defend as to the whole (*Court v. Sheen*). When a *bona fide* counterclaim is set up arising out of the subject-matter of the action and connected with the grounds of defence, unconditional leave to defend should be given, even where the defendant admits part of the plaintiff's claim, as in such circumstances such admission is only subject to the counterclaim which might turn out to be larger in amount (*Court v. Sheen* (supra)). Order 14 was not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defence before the Court, or to make him liable in such a case to be put on terms of paying into Court as a condition of leave to defend (*Jacobs v. Booth's Distillery Co.*). Where there is clearly no defence to the plaintiff's claim, so that the plaintiff should not be put to the trouble and expense of proving it, but the defendant sets up a plausible counterclaim for an amount not less than the plaintiff's claim,

> the order should not be for leave to defend but should be for judgment for the plaintiff on the claim with a stay of execution until the trial of the counterclaim (*Sheppards & Co. v. Wilkinson & Jarvis*).

In *Lee Guat Eng v. Seet Tiam Hock* [1974] 1 MLJ 178, Pawan Ahmad J, held that where there was a plausible counterclaim upon the hearing of an O. 14 application, even if judgment was given for the plaintiff on his claim, there should be stay of execution pending the trial of the counterclaim. In his judgment at p. 179, the learned Judge said,

> Now, coming to the question of stay of execution, I think it will be necessary for me to quote a passage from the Annual Practice 1957 p. 194 under the heading of 'Counterclaim'.
>
> ... Where the defendant has clearly no defence to the plaintiff's claim but sets up a plausible counterclaim for an amount not less than the plaintiff's claim, the order on the plaintiff's application under O. 14 should not be for leave to defend but should be for judgment for plaintiff on the claim with a stay of execution till the trial of the counterclaim, or pending further order...
>
> In view of the above passage, I do not think it is necessary for me to go into other authorities cited by Counsel. It is sufficient to say that where there is a counterclaim, upon the hearing of an O. 14 application, even if judgment is given for the plaintiff on his claim, there should be stay of execution pending the trial of the counterclaim or pending further order.

Mr. Kumar submitted that in the present case the counterclaim was not *bona fide* nor was it plausible.

The question for the Court to consider in the present case is whether there was a *bona fide* and plausible counterclaim. In its statement of defence, the defendant averred that at the trial of the suit the defendant would adduce evidence of the fact that the plaintiff, in breach of its contractual obligations cancelled the advertisement, which was for the benefit of the defendant, without the defendant's consent. As a result, the defendant suffered loss of sales and accruable profits. The loss incurred was expected to exceed the plaintiff's claim. In its counterclaim, the defendant averred that it was entitled to damages in the sum of RM250,000, which exceeded the plaintiff's claim. Mr. Kumar submitted that the counterclaim did not contain particulars. Mr. Sivaloganathan, Counsel for the defendant replied that the plaintiff could always ask for better and further particulars. He added that at the time the defence and counterclaim was filed the defendant did not have the proper account yet as accounting took some time. This was a case of a running account of advertising. He further added that the counterclaim was connected with the subject matter of the claim. I find that the defendant's counterclaim was not made in bad faith.

With regard to the question of plausible counterclaim, it is necessary to ascertain what constitute a plausible counterclaim. In the *Societe's case*, Abdoolcader J stated the proposition that if "the defendant sets up a plausible counterclaim for an amount not less than the plaintiff's claim, the order...should be for judgment for the plaintiff on the claim with a stay of execution until the trial of the counterclaim." The learned Judge based this proposition on the decision of the Court of Appeal in England in *Sheppards & Co. v. Wilkinson & Jarvis* [1889] 6 TLR 13 CA. In that case, the Master of the Rolls said,

> There might be either a defence to the claim which was plausible, or there might be a counterclaim pure and simple. To shut out such a counterclaim if there was any substance in it would be an autocratic and violent use of O. XIV. The Court has no power to try such a counterclaim on such an application, but if they thought it so far plausible that it was not unreasonably possible for it to succeed if brought to trial, it ought not to be excluded.

Lindley LJ in the same case said, "The counterclaim was by no means frivolous, and the defendants ought not to be shut out from trying it." It is clear that when considering whether the defendant had pleaded a plausible counterclaim the test is whether or not it is reasonably possible for the defendant to succeed if the counterclaim is brought to trial. Secondly, whether the counter-claim is frivolous or not. In my judgment, the defendant has set out a plausible counterclaim in that it is reasonably possible for it to succeed at the trial. Furthermore, the counterclaim is not frivolous.

Mr. Kumar contended that the defendant had failed to establish that it had a plausible counterclaim because the defendant had not filed an affidavit to explain how it had a plausible counterclaim. From the record, I find that the defendant had entered appearance on 12 July 1984. The defence and counterclaim was filed on 18 July 1984. I do not think it is mandatory for the defendant to file any affidavit since the defence and counterclaim had already been filed.

For the reasons stated above, I confirm the order I made in Chambers on 11 November 1984 i.e., the plaintiff's appeal is dismissed with costs.

Also found at [1986] 2 CLJ 275